

**BEFORE THE
FEDERAL COMMUNICATION COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
)	
Grande Communications, Inc.)	CC Docket No. 96-45
)	

REPLY COMMENTS

Of

GRANDE COMMUNICATIONS, INC.

Brad E.Mutschelknaus
Todd D. Daubert
Erin R. Swansiger
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600

Its Attorneys

September 12, 2003

TABLE OF CONTENTS

REPLY COMMENTS	1
SUMMARY	1
BACKGROUND	2
THE EFFECTIVE DATE OF GRANDE'S ETC DESIGNATION IS MAY 22, 2003.....	3
GRANDE HAS SATISFIED THE COMMISSION'S STANDARD FOR WAIVER.....	6
CONCLUSION	9

**BEFORE THE
FEDERAL COMMUNICATION COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
)	
Grande Communications, Inc.)	CC Docket No. 96-45
)	

REPLY COMMENTS

Grande Communications, Inc. (“Grande” or “the Company”), through its attorneys, and pursuant to the Commission’s August 15, 2003 Public Notice,¹ hereby files its comments in reply to the opposition filed by CenturyTel, Inc. (“CenturyTel”).

SUMMARY

CenturyTel bases its opposition on two allegations: (1) Grande’s eligible telecommunications carrier (“ETC”) designation date is actually July 15 or August 15, 2003 rather than May 22, 2003 because the Texas Public Utility Commission (“TPUC”) issued an order on July 15, 2003 to correct two improperly numbered paragraphs in the original Grande ETC designation order; and (2) Grande has not met the FCC’s waiver standard. Neither of these allegations has merit.

First, the order issued by the TPUC on July 15, 2003 to correct two improperly numbered paragraphs in the original Grande ETC designation order did not alter the May 22, 2003 effective date of Grande’s ETC designation. Second, Grande has fully met the Commission’s waiver standards, and grant of its waiver petition would be in the public interest. Indeed, the facts that support grant of Grande’s waiver petition are almost identical to the facts that recently led the

¹ *Wireline Competition Bureau Seeks Comment on Petition of Grande Communications Inc. for Waiver of Sections 54.307(C) and 54.314(D) of the Commission’s Rules*, CC Docket No. 96-45, DA 03-2685, Public Notice (rel. Aug. 15, 2003) (“Public Notice”).

Commission to grant nearly identical waiver requests for three other carriers.² As the Commission recognized in granting these three waiver petitions, the public interest is not served by delaying high cost support to an ETC for months – eight months in Grande’s case – merely due to a procedural anomaly. As explained in more detail below, CenturyTel has not offered any substantive or credible arguments against grant of Grande’s waiver petition. Rather, CenturyTel is merely exploiting this opportunity to express its displeasure that it now has to compete with Grande to serve customers in the high cost areas of San Marcos, Texas, and attempting to delay universal service support for its competitor. Therefore, Grande respectfully requests the FCC to grant the waiver petition as soon as possible.

BACKGROUND

On June 30, 2003,³ Grande petitioned the Commission for a waiver of the December 30, 2002 deadline established in Section 54.307(c)(4) of the Commission’s rules for working loop data submissions of competitive ETCs, as well as a waiver of the January 1, 2003 certification deadline established in Section 54.314(d)(2) of the Commission’s rules. Grande made this request in order to become eligible to receive retroactive funding as of May 22, 2003, the date of its designation by the TPUC as a competitive ETC. In its petition, Grande explained that, absent the grant of such a waiver, Grande would face excessive and unwarranted delay in its receipt of

² See, e.g., *Federal-State Joint Board on Universal Service, RFB Cellular, Inc., Petitions for Waiver of Sections 54.314(d) and 54.307(c) of the Commission’s Rules and Regulations*, Order, CC Docket No. 96-45, DA 02-3316 (rel. Dec. 4, 2002) (“RFB Cellular Order”); see also *Federal-State Board on Universal Service, Guam Cellular and Paging, Inc. Petition for Waiver of Section 54.314 of the Commission’s Rules and Regulations*, Order, CC Docket No. 96-45 (rel. April 17, 2003); *Federal-State Board on Universal Service, Western Wireless Corporation Petition for Waiver of Section 54.314 of the Commission’s Rules and Regulations*, Order, CC Docket No. 96-45 (rel. July 18, 2003).

³ On July 1, 2003, Grande submitted an Erratum to correct typographical errors in the original filing. *Grande Communications, Inc., Erratum of Grande Communications, Inc.*, CC Docket No. 96-45 (July 1, 2003).

high cost universal service funding for no other reason than the date on which the Company was designated as a competitive ETC by the TPUC.

On August 15, 2003, the Commission released Grande's Petition for public comment.⁴ CenturyTel was the sole party to file comments opposing Grande's request for waiver of Sections 54.307(c)(3) and 54.314(d)(2) of the FCC's rules.⁵

I. THE EFFECTIVE DATE OF GRANDE'S ETC DESIGNATION IS MAY 22, 2003

By TPUC order, Grande was designated as a competitive ETC on May 22, 2003.⁶ On July 15, 2003, subsequent to the filing of Grande's Waiver Petition on June 30, 2003, the TPUC re-issued Grande's ETC designation order for the express purpose of correcting several misnumbered paragraphs. Grande supplemented its Petition with a copy of this re-issued order.⁷ The TPUC expressly has advised both the FCC and the Universal Service Administrative Company ("USAC") that "the only change from the original order is to correct the numbering of certain paragraphs."⁸

In its comments, CenturyTel claims that the TPUC designation of Grande did not occur until either July 15, 2003 or August 15, 2003 because the TPUC order designating Grande as an

⁴ *Supra* n.1.

⁵ *In re Federal-State Board on Universal Service, Petition of Grande Communications, Inc.*, Opposition of CenturyTel, Inc., CC Docket No. 96-45 (Aug. 29, 2003) ("Opposition of CenturyTel").

⁶ *In re Grande Communications, Inc. Petition for Waiver—Expedited Treatment Requested*, CC Docket No. 96-45, Attachment A (June 30, 2003) ("Grande Waiver Petition").

⁷ *In re Grande Communications, Inc., Amendment to Attachment A to the Petition for Waiver of Sections 54.307(c)(4) 54.314(d)(2) of the FCC's Rules*, CC Docket No. 96-45 (Aug. 27, 2003).

⁸ See Letter from Janice Ervin, Senior Policy Specialist, Telecommunications Division, TPUC, to Marlene H. Dortch, Secretary, FCC, and Irene Flannery, Vice President, High-Cost and Low-Income Divisions, USAC, re Federal-State Board on Universal Service, CC Docket No. 96-45, Grande Communications Network, Inc., TPUC Order on Rehearing (Aug. 28, 2003).

ETC did not take effect until one of those dates, and therefore that the May 22, 2003 order is ineffective.⁹ CenturyTel attempts to support this claim with a tortured and needless explanation of the differing standards of TPUC rules and the rules of the Texas Administrative Procedure Act. CenturyTel's claim, however, is both inaccurate and irrelevant.

To be clear, the *sole* reason that the TPUC issued its July 15, 2003 order was to correct two improperly numbered paragraphs on page two of the May 22 order designating Grande as an ETC. Moreover, the *sole* reason why the TPUC had to issue an order to make this correction was that the TPUC had no procedural rules in place permitting it to issue an order on a *nunc pro tunc* basis. Since the TPUC could not issue the corrective order on a *nunc pro tunc* basis, it simply treated Grande's request to correct the misnumbered findings of fact in the May 22 order as a Motion for Rehearing ("MFR").¹⁰ As a result, the order ultimately issued by the TPUC to correct the misnumbered paragraphs was entitled "Order on Rehearing." That title, together with the correctly numbered paragraphs and the date, are the only changes made to Grande's May 22, 2003 ETC designation order.

Notably, the TPUC denied CenturyTel's substantive motion for rehearing in which CenturyTel challenged Grande's designation as an ETC.¹¹ The TPUC then voted by individual commissioner ballot not to consider CenturyTel's subsequent motion to reconsider the denial of its motion for rehearing.¹²

⁹ See *Opposition of CenturyTel, Inc.* at 2 (Aug. 29, 2003) ("Opposition").

¹⁰ *Id.* at Exhibit D (Transcript of Proceedings Before the TPUC, July 10, 2003).

¹¹ *Id.* at Exhibit D, page 213.

¹² The notion that the denial of CenturyTel's motion for rehearing on the merits somehow results in a delay of the effectiveness of the designation date established by the original order is far-fetched, and it would lead to the absurd result that a disgruntled party like CenturyTel improperly could postpone indefinitely the impact of an agency determination simply by filing repeated motions for reconsideration.

In accordance with Section 54.314(a) of the FCC's high cost universal service support requirements, on May 27, 2003, the TPUC certified Grande as an ETC to the USAC and the FCC by sending both entities copies of Grande's May 22, 2003 ETC designation order. Further, on June 27, 2003, the TPUC, on behalf of Grande and pursuant to Section 54.314(a) of the FCC's rules, certified to the FCC and to USAC that Grande would use federal high-cost support for such elements to "for the provision, maintenance and upgrading of its facilities and services as intended."¹³ The TPUC would not have certified Grande to the USAC and the FCC as an ETC, thus rendering Grande eligible to begin receiving federal universal service support, if Grande's ETC designation had been ineffective or the May 22 order designating Grande as an ETC was not binding for any reason.

The TPUC's own words and actions also demonstrate that the subsequent July 15, 2003 order has no impact on the effective date of Grande's designation as an ETC. First, the Order on Rehearing itself has no substantive differences from the May 22 order: the Order on Rehearing nowhere states that the TPUC was amending the original May 22, 2003 date of designation or otherwise changing the date of Grande's ETC designation. Second, the Texas Commissioners explicitly stated during the hearings that led to the Order on Rehearing that the TPUC was issuing the second order solely to correct the errors in the first order, as demonstrated by the July 15, 2003 hearing transcript.¹⁴ Thirdly, the *pro-forma* letter that TPUC staff issued recently to the FCC and to USAC, to which, notes simply that the TPUC was providing a copy of the July 15 Order on Rehearing "*for your records. Please note that the only change from the original*

¹³ See Attachment B to Grande Waiver Petition.

¹⁴ *Supra* n.10 (in which the TPUC states that: "[w]e need to correct our order. And given that we don't have any Procedural Rules regarding nunc pro tunc, I just would propose that we treat it as an MFR and reissue it with the particular corrections, which are renumbering the findings of facts . . . [a]nd then any conforming changes as they affect the Conclusions of Law."

*order is to correct the numbering of certain paragraphs.”*¹⁵ If the Order on Rehearing had amended Grande’s ETC designation date, the TPUC would have noted the new ETC designation date at any of these three times.

In short, the language of the July 15, 2003 Order and the statements by the TPUC and TPUC staff confirm that the Order on Rehearing did not amend Grande’s ETC designation date of May 22, 2003. Therefore, the FCC should reject CenturyTel’s unsupported claims to the contrary.

II. GRANDE HAS SATISFIED THE COMMISSION’S STANDARD FOR WAIVER

CenturyTel also claims that Grande has not met the FCC’s waiver standard and alleges that Grande, by its Petition, is seeking what amounts to a rule change to the FCC’s rules governing line-count and certification submissions.

CenturyTel has completely mischaracterized Grande’s Petition. In its petition, Grande (1) sets forth the standard for the Commission’s waiver of its rules, (2) notes that courts have held that good cause exists to waive a Commission rule if special circumstances warrant a deviation from the general rule and if such a deviation will serve the public interest, and (3) points out that, in the universal service context, in waiving universal service funding rules and procedures, the Commission has found that a regulation which is not required by statute (as in this case) may and must be waived where failure to do so would amount to an abuse of discretion.¹⁶

In the case of Grande, special circumstances *do* warrant a deviation from the general rule, and such deviation *would* better serve the public interest than strict adherence to the general rule.

¹⁵ *Supra* n.8 (emphasis added).

¹⁶ *See Grande Waiver Petition* at 12.

As demonstrated by Grande in its Petition, due solely to the mechanics of USAC's high cost funding procedures, the fact that the date of Grande's ETC designation falls sometime after the certification and working loop submission deadlines established in Section 54.314(d) and Section 54.307(c) of the Commission's rules has resulted in an inequitable situation in which Grande, unlike many other ETCs, would be compelled to wait for several quarters before beginning to receive high cost support, absent a waiver of the FCC's certification and line count deadlines. This result would be both contrary to the public interest and to the Commission's well-established universal service principles of competitive neutrality.

As Grande pointed out in its Petition, the Commission recently has granted similar waiver requests by other competitive ETCs to ensure that such carriers receive high cost universal service support at the time of their designation or certification, in order to avoid months of lost support. Far from detracting from Grande's waiver request and rendering it a request for a rule change, as CenturyTel claims, the Commission's granting of similar such waivers supports the approval of Grande's request. Simply because three other carriers, out of the many that have been designated as competitive ETCs, have found themselves in the same position as Grande, due to the sheer happenstance of their individual designation dates as related to the line-count and certification deadlines of the Commission's rules, does not render Grande's waiver request a rule change. Grande is perfectly within its procedural rights to seek a waiver of the FCC's existing rules and its request to do so comports fully with all FCC requirements.

CenturyTel also claims that Grande has made no showing that a waiver would serve the public interest. To the contrary, in its Petition, Grande fully explained that a waiver of these rules would be both in the public interest and fully consistent with the Commission's overarching universal service goal of competitive neutrality. Grande asserted that, absent such funding,

Grande will be severely hampered in its ability to provide competitive telecommunications services to consumers in high cost areas like San Marcos, Texas, due purely to circumstances that were not within the Company's control. Delayed funding to competitive ETCs clearly is incompatible both with the public interest and with the Commission's express universal service goal of competitive neutrality, as specifically acknowledged by the Commission on prior occasions.¹⁷

All of CenturyTel's claims ring resoundingly hollow. The date on which Grande begins to receive universal service funding from the USAC should be transparent to CenturyTel. The nature of CenturyTel's opposition to Grande's Petition calls into question CenturyTel's motives for filing an opposition to Grande's petition – motives that are made readily apparent when CenturyTel launches into its true reason for filing its opposition in this proceeding – to use this improper forum to make its case against federal universal service funding for competitive ETCs.¹⁸ CenturyTel would be better served to take its own advice and to render such comments in the more appropriate forum of the Commission's rulemaking proceeding on universal service funding and designation rather than attempting to persuade the Commission to make a “a rule change that it ought to seek through the rulemaking process.”¹⁹

¹⁷ See *RFB Cellular Order* ¶ 10.

¹⁸ *Opposition of CenturyTel* at 7.

¹⁹ *Id.* at 5.

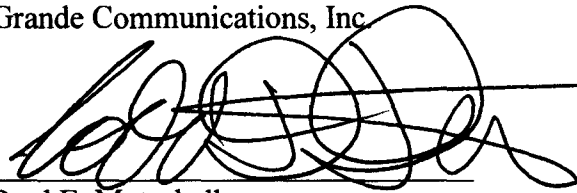
CONCLUSION

For the reasons set forth above, Grande respectfully requests the Commission to grant the requested waiver as soon as possible.

Respectfully submitted,

Grande Communications, Inc.

By:



Brad E. Mutschelknaus
Todd D. Daubert
Erin R. Swansiger
Its Attorneys

Dated: September 12, 2003

CERTIFICATE OF SERVICE

I, Ella R. Hubbard, a legal secretary at Kelley Drye & Warren LLP, do hereby certify that on this 12th day of September, 2003, unless otherwise noted, a copy of the foregoing "REPLY COMMENTS," was sent by the means indicated to each of the following:

Marlene H. Dortch
Commission's Secretary
445 12th Street, SW
TW-A325B204
Washington, DC 20554
(via ECFS)

Qualex International
Portals II
445 12th Street, SW
Room CY-B402
Washington, DC 20554
qualexint@aol.com
(via electronic mail)

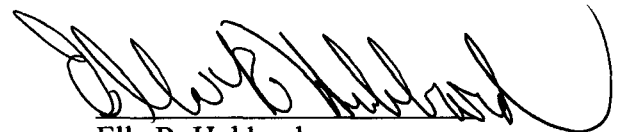
Karen Brinkmann
Richard R. Cameron
Latham & Watkins
555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004
(202) 637-2200
(via U.S. mail)

Brook B Brown
McGinnis, Lochridge & Kilgore
1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701
(via U.S. mail)

Thomas Buckley, Esq.
Wireline Competition Bureau
445 12th Street, SW
Washington, DC 20554
(via electronic mail)

Sharon Webber, Esq.
Wireline Competition Bureau
445 12th Street, SW
Washington, DC 20554
(via electronic mail)

John F. Jones
Vice President, Federal Government Relations
CenturyTel, Inc.
100 Century Park Drive
Monroe, Louisiana 71203
(318) 388-9000
(via U.S. mail)



Ella R. Hubbard